APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Roger Lee Glavin and Robert Loring Chesney, *Appellants,* vs. United States of America, *Appellee.* No 21,374.

[June 7, 1968]

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH and BROWNING, Circuit Judges, and POWELL, District Judge.

BROWNING, Circuit Judge:

These are appeals from convictions under 18 U.S.C. § 2312 (1964) (interstate transportation of stolen motor vehicle), and 18 U.S.C. § 2314 (interstate transportation of stolen goods).

1. On the day set for trial the attorney who had been retained by both appellants (and who represents both on appeal) moved to be relieved of representing appellant Roger Glavin. Both appellants claim that the court committed error in denying the motion.

The proceedings on the motion are set out in full in the margin.[1] The precise ground for the motion was

[1]COUNSEL: Your Honor, it appears there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would therefore move the Court at this time to be relieved of representing Mr. Glavin.

(This footnote is continued on the next page)

not clearly articulated. Counsel began by stating, "it appears there may perhaps be a conflict of interest here," thus suggesting the existence of the problem dealt with in *Glasser v. United States,* 315 U.S. 60 (1942), namely, that common counsel was representing two defendants who had inconsistent interests. Counsel continued, however, "Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him," thus suggesting that rather than a conflict of interest caused by the common representation the problem was that one of counsel's two clients was dissatisfied and wished to replace him.

The court apparently placed the latter construction on counsel's remarks, so that an exercise of its discretion was required. *Good v. United States,* 378 F.2d 934, 935-36 (9th Cir. 1967). We cannot say that the court improperly exercised that discretion since counsel had represented appellant Roger Glavin for at least three weeks, the motion was presented on the day set for trial, no justification was offered for the lateness of the motion, and the court had been advised that the trial, scheduled to begin immediately, would require the appearance of nineteen witnesses, some from out of state, and would continue for four days.

Appellants now contend that the motion was intended to advise the court that there was a conflict of interest between the two appellants and that, therefore,

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THE COURT: Well, these people are entitled to a speedy trial, and we are here this morning ready to try the case. Now I have read the file in this case and it appears these defendants have been out on bond since early in May, which has afforded them ample time to secure whatever representation they desired. So I would deny your motion, Mr. Baumen, and we will proceed to try the case.

representation of both by a single attorney would deprive them of effective assistance of counsel. Denial of such a motion is reversible error where there is some possibility that appellants have divergent interests so that one or both might not receive "untrammeled and unimpaired" assistance from common counsel. *Glasser v. United States,* 315 U.S. 60, 70 (1942).

But common representation is not error *per se.* There must be some possibility of conflicting interest, and hence of prejudice.[2] Appellants did not identify any possible divergence of interest in the trial court; there briefs to this court suggest none; the government contends that no possible conflict could have existed; and we have found none in our examination of the record.

2. Appellant Roger Glavin complains of the denial of his motion to suppress evidence found in what he contends was an illegal search of one of the two stolen trucks.

An inventory taken at the Montebello, California, branch of the International Harvester Corporation on March 3, 1966, disclosed that a 1966 International Harvester long wheel base, 10-wheel diesel truck was missing. An inventory taken on April 12 at the Glendale, California, branch disclosed the absence of a 1966 Inter-

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[2]Cases from this court include Juvera v. United States, 378 F.2d 433, 437-39 (1967); Kaplan v. United States, 375 F.2d 895, 898 (1967); Lugo v. United States, 350 F.2d 858, 859 (1965); and Gonzales v. United States, 314 F.2d 750, 752 (1963).

See also Lollar v. United States, 376 F.2d 243, 244-47 (D.C. Cir. 1967); United States v. Paz-Sierra, 367 F.2d 930, 933 (2d Cir. 1966); United States v. Armone, 363 F.2d 385, 406 (2d Cir. 1966); Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965); United States v. Dardi, 330 F.2d 316, 335 (2d Cir. 1964); United States v. Bentvena, 319 F.2d 916, 937 (2d Cir. 1963). *Cf.* 18 U.S.C. §3006A(b) (1964).

national Harvester 3-axle diesel truck equipped with a refrigeration unit. The Montebello truck was recovered on May 2. Lyman Ross, a special agent of the National Auto Theft Bureau, was present and observed that the stolen Montebello truck had been repainted in a red and white pattern. The next day Agent Ross saw a truck on the highway which met the description of the stolen Glendale truck, which was painted the same color combination as the recovered Montebello truck, and which was pulling a trailer similar to one which Agent Ross knew had been stolen earlier in East Los Angeles. Agent Ross followed the truck until it pulled into a service road whereupon he radioed the California Highway Patrol. He explained to the officer who responded to his call why he believed the truck to be the one stolen from Glendale. The officer and Agent Ross followed the truck when it resumed its journey. It stopped again at a weighing scale. The officer then asked the driver to move the truck to an adjacent parking area. There Agent Ross opened the door, discovered that the cab serial number was the same as that of the stolen Glendale truck, and so informed the officer. The officer arrested the driver, Larry Rexius, and appellant Roger Glavin, who was also in the truck.

Appellant Roger Glavin argues that the warrantless search which disclosed the serial number was unlawful, that the subsequent arrests of Rexius and appellant Roger Glavin were tainted by the search and were also unlawful, and that therefore certain evidence discovered in the search of the truck immediately after the arrests should have been suppressed.

If detaining the truck and checking its serial number constituted a "search" or "seizure" (see *Cotton v.*

United States, 371 F.2d 385, 393 (9th Cir. 1967)), it was supported by probable cause to believe the truck was recently stolen by those in possession, and that evidence verifying the identification of the vehicle as the stolen truck would be found by the search. The officers were justified in proceeding without a warrant by the "exceptional circumstance" created by the truck's mobility.[3]

3. Appellant Chesney contends that certain evidence taken from one of the trucks was improperly admitted as to him.

In a search of the Montebello truck incident to the arrest of Bazil Buehler and defendant Leon Glavin (appellant Roger Glavin's brother),[4] the police discovered an invoice reflecting the sale of a truck part by Motor Truck Distributing Co. to "Chesney Trk." In the search of the Glendale truck the police discovered a number of receipts or memoranda of delivery bearing a credit card imprint in the name "Robert L. Chesney," reflecting the purchase of diesel fuel. In objecting to their admission, counsel referred to the documents as "hearsay," but the basis for the objection reflected in counsel's extended colloquy with the court was that any legitimate inference of connection between appellant Chesney and the theft of the trucks which might be

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[3]Dyke v. Taylor Implement Co., ... U.S. ...., ... (1968); Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, 267 U.S. 132 (1925). *Cf.* Chapman v. United States, 365 U.S. 610, 615 (1961); United States v. Jeffers, 342 U.S. 48, 52 (1952); Johnson v. United States, 333 U.S. 10, 15 (1948).

Appellant relies upon Henry v. United States, 361 U.S. 98 (1959), and Mosco v. United States, 301 F.2d 189 (9th Cir. 1962), but in neither case was the search supported by probable cause.

[4]Leon Glavin was indicted and convicted but did not appeal.

drawn from the presence of these documents bearing his name in the trucks was remote while the danger that an improper inference would be drawn was great. Thus the objection was not one of hearsay since the documents were not being submitted to prove the occurrence of the sale transactions or the existence of any other fact which the documents purported to record. The documents were submitted only in proof of their own existence; their presence in the trucks was offered for its probative value on the issue of appellant Chesney's involvement in the theft. In admitting the documents the court carefully reviewed the other evidence in the record which connected appellant Chesney with the trucks and lent weight to the inference of Chesney's involvement. There was no doubt a risk that the jury might take the documents as proof of the facts they purported to record—that appellant Chesney's credit had been used to purchase parts and fuel for the trucks—facts as to which the documents were hearsay.[5] But the task of "balancing . . . probative values against probative dangers" rested with the trial judge, and we are not prepared to say that his ruling exceeded the "leeway of discretion" vested in the court in resolving problems of this kind. McCormick, Evidence § 152 at 320 (1954).

4. Appellant Chesney argues that certain other evidence was improperly admitted.

Two men—Bazil Buehler and Leon Glavin—were in the Montebello truck when it was recovered. Both were arrested. The police, believing Buehler was not in-

[5]We do not mean to suggest that admission of the documents for this purpose would necessarily be error. See Morrow v. States, 59 A.2d 325, 326, 190 Md. 559 (1948).

volved, released him. On the following afternoon appellant Chesney telephoned Buehler and asked Buehler to go to Leon Glavin's house to get a package for him containing license tags, pieces of blank metal, and various papers. Buehler called the police and told them of Chesney's request. He was told to pick up the package and notify the police. When Buehler reached home he discovered that Leon Glavin's wife had given a package to Buehler's wife. The package contained the items described by Chesney. Buehler called the police, who met him, examined and photographed the items in the package, and told him to complete the delivery to Chesney if he could. Buehler called Chesney and told him he had the package. Chesney asked Buehler to meet him at the Greyhound Bus terminal. Buehler did so, and turned the package over to Chesney, who stated, Buehler testified, that he "was glad to get it, because if it got in the wrong hands it could put them all behind bars." The police then arrested Chesney.

Appellant Chesney objected to the introduction of the contents of the package on the ground that the facts disclosed an "entrapment procedure" by which the police "planted" the package in Chesney's "temporary custody" for the purpose of implicating him. The trial court overruled the objection on the ground that the idea for the delivery of the package originated with Chesney and not the police. The court saw nothing objectionable in the fact that the police had suggested to Buehler that he complete the delivery of the package as Chesney had requested. As the court noted, "no one asked Mr. Chesney to take it, according to the testimony; he asked for it; he got it."

We agree. The police did not "entrap" appellant Chesney or "plant" the evidence upon him; they were under no obligation to prevent him from implicating himself by interrupting the chain of events which he had set in motion.

5. Both appellants urge that there was error in the instructions.

The trial court instructed the jury that possession of recently stolen property "if not satisfactorily explained" is a circumstance from which the jury may reasonably draw the inference and find in the light of the surrounding circumstances shown by the evidence that the possessor knew the property was stolen and participated in the theft. Appellants argue that the instruction diminished the presumption of innocence by imposing on them the burden of negating the elements of the crime and that it violated the Fifth Amendment by permitting an adverse inference from their failure to testify.

The court instructed the jury that the burden is "always" upon the prosecution to prove every element of the crime beyond a reasonable doubt, that the defendants were presumed innocent, and that the presumption of innocence was sufficient to acquit unless the jurors were satisfied beyond a reasonable doubt of the guilt of each defendant "from all the evidence in the case." The inference from possession of recently stolen property was not given conclusive effect. On the contrary, the jury was told that possession of recently stolen goods was "ordinarily" a circumstance from

which knowledge and participation could be inferred. It was made explicitly clear that possession was to be considered "in the light of surrounding circumstances in the case"; and that it was "the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. If any possession the accused may have had of recently-stolen property is consistent with innocence, the jury should acquit the accused." In sum, the jury was instructed to do "no more than 'accord to the evidence, if unexplained, its natural probative force.'" *United States v. Gainey*, 380 U.S. 63, 71 (1965). *Cf. Turner v. United States*, ... F.2d ....., ... (9th Cir. 1968). These instructions did not shift the burden of proof to appellants. Indeed, the jurors were told "the law never imposes upon a defendant in a criminal case the burden of producing evidence."

Nor did the instructions compel the appellants to testify. As the court instructed the jury: "In considering whether possessio of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." The court added: "A defendant in a criminal case is not required to take the stand and

testify. When he chooses this course of action, no presumption of guilt may be raised and no inference adverse to him may be drawn from this fact by the jury. The defendant, having availed himself of this privilege, you are to draw no inference of guilt against him from it. The presumption of innocence still applies to him. And if from the evidence adduced by the government and from the testimony of such witnesses as the defendant has produced, or either of them, a reasonable doubt arises in your mind as to the defendant's guilt, you should acquit him." *Cf. United States v. Gainey*, 380 U.S. at 70-71.

Affirmed.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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319-831—66

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 512

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 412

ROGER LEE GLAVIN AND ROBERT LORING CHESNEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1968. A petition for rehearing was denied on July 18, 1968. The petition for a writ of certiorari was filed on August 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the trial court erred in denying the motion of the attorney retained

by both petitioners in which he sought to withdraw as counsel for one of them.

2. Whether the trial court violated the presumption of innocence and the privilege against self-incrimination by instructing the jury on the inference which may be drawn from facts showing possession of recently stolen property.

3. Whether the police "planted" on petitioner Chesney evidence which was later admitted at trial.

4. Whether the conclusion that the truck in which petitioner Glavin was arrested was stolen turned on an illegal search, necessitating suppression of evidence obtained from a search of his person at the time of his arrest.

5. Whether the trial court properly admitted documents showing petitioner Chesney's involvement in the crime.

STATEMENT

Petitioners were tried in the United States District Court for the Central District of California. Petitioner Glavin was convicted on two counts charging interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. 2312, and on one count charging interstate transportation of stolen property in violation of 18 U.S.C. 2314. Petitioner Chesney was convicted on the two counts charging interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. 2312.[1] Each petitioner was sentenced to concurrent five-year terms on each count. The court of appeals affirmed (Pet. App.).

[1] Petitioner Roger Glavin's brother, Leon, was also convicted, but did not appeal.

The sufficiency of the evidence is not challenged here. On or about February 9, 1966, a 1966 International Harvester Truck (hereafter the "Montebello truck") was stolen from the Montebello branch office of International Harvester Corporation (2R. 11–12, 21). Among other identifying marks, the engine was fitted with fuel pump No. 357822 (2R. 161). Shortly thereafter, a truck similar in description was observed in a garage rented by petitioner Glavin in North Hollywood, California, where it was being worked on by Glavin and Chesney. Petitioner Glavin and his brother painted the truck red and white (2R. 72–80, 132, 149).

In late February or early March 1966, petitioner Glavin entered into a contract to haul freight for the Western Fruit Express Company. Using the Montebello truck, he hauled a load from Los Angeles to Vero Beach, Florida, and returned (2R. 223–230; 3R. 301).

During the first week in April 1966, a 1966 International Harvester truck (hereafter the "Glendale truck") was stolen from the Glendale branch of International Harvester (2R. 32–33, 41–43). Among other identifying marks, the cab bore serial No. A 47271 (2R. 59). On April 9, 1966, a refrigerated trailer, bearing Serial Number 8421, was stolen from Hauling Equipment, Inc. (2R. 180–185).

The following day, a truck similar to the Glendale truck was observed at the home of petitioner's brother, Leon Glavin, where both petitioners were preparing it for painting (3R. 454–458). On April 12, petitioner Glavin and another drove the Glendale truck and re-

frigerated trailer from Los Angeles to Lima, Ohio, and then returned (2R. 242–253).

On May 2, 1966, a police officer with the Los Angeles Police Department observed a truck similar in description to the Montebello truck parked in Los Angeles. After comparing the fuel pump number with that of the Montebello truck, they placed it under surveillance. Eventually, Leon Glavin got into the truck and drove away. He was later arrested (3R. 290–295).

The arrest of petitioners is discussed *infra*, pp. 8–10, in connection with their specific contentions.

ARGUMENT

1. On the first day of trial, defense counsel, who had been retained by both petitioners, moved to be relieved of his representation of Glavin. Counsel stated (4R. 2):

> Your Honor, it appears there may perhaps be a conflict of interest here. I appear for both Mr. Roger Glavin and Mr. Chesney. Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him. I would therefore move the Court at this time to be relieved of representing Mr. Glavin.

In denying the motion, the trial court ruled (4R. 2):

> Well, these people are entitled to a speedy trial, and we are here this morning ready to try the case. Now I have read the file in this case and it appears that these defendants have been out on bond since early in May, which has afforded them ample time to secure whatever representation they desired. So I would deny

your motion, Mr. Bauman, and we will proceed to try the case.

Relying upon *Glasser* v. *United States*, 315 U.S. 60, both petitioners contend that the trial court's denial of the motion constituted reversible error. *Glasser*, however, presented a situation different from that here involved: in that case at the opening of trial the district court, over Glasser's personal objection, appointed the lawyer that Glasser had retained to act also as counsel for a co-defendant. This Court emphasized that the vice in those circumstances was the trial court's affirmative creation of an evident conflict of interest. See 315 U.S. at 70–71. By contrast, in this case petitioners themselves had agreed upon a single lawyer, and he was in no fair sense imposed upon one of them. In addition, here, unlike the situation in *Glasser*, the threat of a serious conflict of interest was never meaningfully "brought home" to the trial court. 315 U.S. at 71, 76. Although counsel at first mentioned the possibility of a "conflict of interest", he went on to intimate that what was involved was not a potential inconsistency in defenses on behalf of his two clients, but was rather Glavin's dissatisfaction with counsel's trial strategy. The trial court's reference to the adequacy of the time for petitioners to have arranged other representation indicates that this was his understanding of the objection. No further indication that counsel was concerned about inconsistent defenses and divided loyalties was given. Thus, the trial court was actually requested to rule on a motion to be relieved because of a last minute disagreement between counsel and client. Taking into account that Glavin

had had an ample opportunity to secure other counsel, that the motion was not made until the day set for the opening of trial, and that the court had been advised that some nineteen witnesses, some from out-of-state, were to be called (Pet. App. 2), the trial court did not abuse its discretion in proceeding to trial. See *Good* v. *United States*, 378 F. 2d 934, 935–936 (C.A. 9).

Moreover, aside from counsel's belated suggestion—unsupported by the record—that Chesney would have testified in his own behalf had the joint representation been terminated (Pet. 13), there is no showing or substantial suggestion of any prejudice that resulted from joint representation. In these circumstances, and in view of the overwhelming evidence against both petitioners, the fact that both of them were represented by one lawyer whom they had chosen does not warrant reversal of the convictions. See, *e.g.*, *United States* v. *Dardi*, 330 F. 2d 316 (C.A. 2), certiorari denied, 379 U.S. 845; *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940.

2. The court instructed the jury (3R. 597):

> And possession of property recently stolen, if not satisfactorily explained, is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property.

In light of the surrounding circumstances connecting both petitioners with the theft, the instruction was proper, cf., *Battaglia* v. *United States,* 205 F. 2d 824 (C.A. 4), and petitioners do not argue that it was unrelated to the evidence. They contend instead that the instruction shifted the burden of proof, thereby diminishing the presumption of innocence, and permitted the jury to draw an inference from their failure to testify in their own behalf. These contentions are without merit.

By giving the instruction, the trial court did not shift the burden of proof, but at most recognized that the government had established a *prima facie* case and thus placed upon the accused the burden of going forward with his defense. See *Roviaro* v. *United States,* 353 U.S. 53, 63. The instruction was carefully guarded, advising the jury only that "ordinarily" possession of recently stolen goods is a "circumstance" from which a jury "may reasonably draw" an inference of involvement. Any possible problem was avoided by the express instruction that the burden of proving every element of the crime is "always" on the government (3R. 589). Thus, the court merely allowed the jury to do "no more than 'accord to the evidence, if unexplained, its natural probative force.'" *United States* v. *Gainey,* 380 U.S. 63, 71.

Nor did the charge have the effect of telling the jury that they could draw an inference of guilt from petitioners' failure to testify. The trial court explained (3R. 598, 600):

> In considering whether possession of recently stolen property has been satisfactorily ex-

plained, the jury will bear in mind that in the exercise of Constitutional rights, the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused.

* * * * *

A defendant in a criminal case is not required to take the stand and testify. When he chooses this course of action, no presumption of guilt may be raised and no inference adverse to him may be drawn from this fact by the jury. The defendant, having availed himself of this privilege, you are to draw no inference of guilt against him from it.

3. After petitioner Glavin's brother and one Bazil Buehler were arrested in the Montebello truck, Buehler was released. Petitioner Chesney soon telephoned Buehler and asked him if he would bring him a package—containing envelopes, license tags, pink slips and papers—which was then at Leon Glavin's house (3R. 461). Fearing that he would become implicated in the crime, Buehler telephoned the police and explained the nature of Chesney's telephone call. The police advised Buehler to comply with Chesney's request (3R. 461). After acquiring the requested package, Buehler met with local police and F.B.I. agents, and the contents of the package were photographed and labeled (3R. 462, 485). Buehler then met Chesney as arranged. When Buehler gave Chesney the package, Chesney stated that "he was glad to get it, because if it got into the wrong hands it would put them all behind bars" (3R. 464–

465). Surveilling agents then placed Chesney under arrest (3R. 486).

Without challenging the accuracy of this narration, petitioner seeks to argue that these events constituted an "entrapment procedure" during which incriminating evidence was "planted" on him (Pet. 17–18). The evidence clearly showed that Buehler obtained the package at Chesney's request. There was thus no "entrapment." As the court below properly noted, the police "were under no obligation to prevent him from implicating himself by interrupting the chain of events which he had set in motion" (Pet. App. 8). Nor, of course, was the evidence found in his possession "planted." As the trial court noted in overruling an objection to the evidence, and as the court of appeals agreed, "no one asked Mr. Chesney to take it, according to the testimony; he asked for it; he got it" (Pet. App. 7).

4. When petitioner Glavin's brother and Buehler were arrested in the Montebello truck, one Lyman Ross, a special agent with the National Auto Theft Bureau (an "insurance company sponsored organization" (Pet. 20)), was present. He observed that the stolen Montebello truck had been painted in a red and white pattern (2R. 108–109). On the following day, Ross observed a 1966 International Harvester truck pulling a refrigerated trailer proceeding north on Ventura Freeway. Ross noted that the truck had the same color combination as that recovered the previous day. When the truck stopped on a service road, Ross further noted that the trailer had no license

plate. He then radioed the California Highway Patrol and requested that an officer meet him at that location (2R. 109–111). When Officer Imboden arrived, Ross explained that one I–H truck had been taken from Montebello and one from Glendale; that the truck which he was then observing had a color combination similar to that of the Montebello truck recovered the day before; and that the truck under observation was similar in description to the one stolen from the Glendale branch in East Los Angeles (2R. 111; 3R. 406).

On the basis of this information, Ross and Imboden followed the truck to the Montalvo Highway Patrol Truck Scales. Officer Imboden approached the truck and asked petitioner Glavin for the registration papers. During this time, Imboden observed that the trailer and the rear of the truck had no license plates, and that the front license plate had no quarterly registration. Ross then opened the left hand door of the cab and observed that the serial number of the cab corresponded with that of the truck stolen from Glendale. Petitioner Glavin was immediately placed under arrest (2R. 112–113). Thereafter, a search of the vehicle disclosed certain documents and other information which showed that the truck was the same as that stolen from Glendale (3R. 414–415, 419, 420, 445–446).

In the circumstances, the trial court properly denied petitioners' motion to suppress. Prior to the time when Ross entered the cab to determine the

serial number, Ross had already given Imboden sufficient information to justify a reasonable belief that the truck had been stolen. Added to this information were Imboden's own observations—*i.e.*, the lack of license plates and quarterly registration—all of which reinforced that belief. The exigencies of the situation thus justified the warrantless search. See *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132.

5. From the Montebello truck, authorities retrieved an invoice reflecting the sale of a truck part to "Chesney Trk." (3R. 297–298). The search of the Glendale truck disclosed ten diesel fuel credit card receipts bearing the name "Robert L. Chesney" (3R. 445–446). Petitioner Chesney contends that the trial court improperly received these "hearsay" documents without a proper foundation. But "hearsay" applies properly only to statements which are intended to be communicative and which are introduced to prove the truth of the facts asserted. By contrast, the fact of the statement's existence may have circumstantial significance apart from the truth or falsity of what is asserted. The test of admissibility for this latter purpose is its relevance, when compared with any danger of confusion. See McCormick, *Evidence*, §229, at p. 479 (1954). This is such a case. As the court of appeals noted (Pet. App. 5–6), petitioner Chesney's objection at trial was not that the documents were inadmissible hearsay; rather, he argued that the inference which might legitimately be drawn from their mere presence in the truck—suggesting Chesney's cooperation in the

venture irrespective of whether he had actually made the purchases recited in the receipts—was remote and off-set by the danger that the jury would draw an improper inference from them. The court below was on firm ground in holding that the trial judge's "balancing" of the probative value against potential danger, and his admission of the evidence, did not involve an abuse of discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1968.

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